

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
)
v.) CR. NO. 3:06cr41-MEF
)
JUDY ANN BANKS SIMS)

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
SUPPLEMENTAL BRIEF**

Comes now the United States of America, by and through Leura G. Canary, United States Attorney for the Middle District of Alabama, and responds to defendant's Supplemental Brief as follows:

In her supplemental brief, defendant cites Holdeman v. Devine, 474 F.3d 770 (10th Cir. 2007), to support her contention that her false statements regarding plan assets did not "facilitate or conceal a theft or embezzlement," and that therefore U.S.S.G. § 2E5.3(a)(2) is inapplicable. As shown below, defendant's reliance on Holdeman is misplaced.

In Holdeman, the court held that the CEO of a corporation, who was also a plan fiduciary, did not breach his fiduciary duty to the plan by causing the company to fail to make the required plan contributions. The Government agrees that Holdeman and other similar cases preclude the application of the abuse of trust enhancement to Sims' conduct. However, this is a separate inquiry from whether Sims was committing a theft or embezzlement. As the Government demonstrated in a previous filing,¹ Sims' conduct in billing her customers for plan contributions and then keeping the money for the direct benefit of her husband is a theft or embezzlement

¹See Government's Response to Sims' Objection to Revised Pre-Sentence Investigation Report (Doc. 18).

within the meaning of section 2E5.3(a)(2), and therefore the court should compute Sims' Guideline Range using section 2B1.1.

CONCLUSION

For the reasons set forth above and in the Government's previous filings, the Government requests that the Court overrule defendant's objection to the applicability of U.S.S.G. § 2E5.3(a)(2).

Respectfully submitted this the 12th day of March, 2007.

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